COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION
Legislative Hearing on "A Bill To Reauthorize and Amend the Voting Rights Act of 1965"
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STATEMENT OF J. GERALD HEBERT
ATTORNEY-AT-LAW

J. GERALD HEBERT PC
5019 Waple Lane
Alexandria VA 22304
(703) 567-5873
www.voterlaw.com

Mr. Chairman, Mr. Vice Chairman, and distinguished Members of this Committee. Thank you for inviting me to testify before you today on a piece of legislation that has proven to be the strongest and most effective piece of civil rights legislation in our Nation's history: the Voting Rights Act.

I previously appeared before the Subcommittee last October and at that time focused my comments on the bailout provisions of the Act. Today, I will focus my comments this morning on a few key provisions of the proposed bill that has been circulated for discussion and has been shared with me by the Subcommittee staff. I also will briefly touch on a few other issues as they relate to reauthorization of the Act.

Before getting to the bill itself, however, I want to take a few moments to talk about the coverage formula that has been a part of the Voting Rights Act since its inception. The coverage formula is important because it dictates which jurisdictions are subject to the Act's special provisions.

As I read the proposed bill, the coverage formula determinations remain as they were. Even though the Supreme Court has upheld the Act against constitutional challenge on two occasions (1966 and 1980), much time has passed not only since the original Act was passed but also since the constitutionality of the Act has been revisited. On several occasions since 1980, the Court has decided voting rights cases assuming its constitutionality.

In 1997, the Supreme Court struck down as unconstitutional the Religious Freedom Restoration Act, finding that Congress had exceeded its enforcement power under the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court 's opinion in *Boerne* cited and quoted with approval passages from its earlier 1966 decision upholding the constitutionality of the Voting Rights Act in *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). The Court in *Boerne* actually seemed to reiterate its earlier reasons for upholding the Voting Rights Act in the *Katzenbach* case and distinguishing the Voting Rights Act from the unconstitutional Religious Freedom Restoration Act. Thus, many have assumed since that time that the Court's *Boerne* decision points toward why the Court continues to view the Voting Rights Act as constitutional today. I think the record that this Committee has assembled shows quite convincingly that the engine of racial discrimination runs on and the need for the special provisions continues.

The coverage formula issue is straightforward. According to the Supreme Court, Congress's enforcement power under the Civil War Amendments extends only to enacting legislation that enforces those Amendments. *City of Boerne v. Flores, supra.* The Court has described this power as "remedial". *South Carolina v. Katzenbach, supra,* at 326. The Court has cautioned that Congress lacks the power to decree the substance of those Amendments. In other words, Congress has the power to enforce, not the power to determine what constitutes a constitutional violation. *City of Boerne, supra,* at 519.

The proposed legislation that I have reviewed makes no changes in the coverage formula. To be sure, the constitutionality of all of the Act's special remedial provisions hinges on the coverage formula, so it is clearly an important issue. And because *City of Boerne* is now nearly ten years old and the composition of the Court has changed, no one can safely predict how the Court will view the constitutionality of an Act based on a coverage formula that many consider outdated.

Congress has developed a detailed factual record that supports the reauthorization of the special provisions. This Committee has been doing a terrific job of gathering this information over the past year and I commend this Committee for doing so. I think it will help those of us who intend to defend the Act's constitutionality in the future against attacks from Mr. Clegg and his group to be able to point to the reasons Congress decided that the continuing problems of discriminatory voting practices warrants an extension of the Act. Congress's approach to studying the current conditions in the covered jurisdictions to insure that the Act still continues to be a good fit to voter discrimination is consistent with the admonition in *City of Boerne* that "[t]here must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne, supra*, at 520.

Mr. Clegg (p.7) complains that the record developed by congress is anecdotal and doesn't involve much intentional discrimination. He is apparently unaware of a lot of the information that has been developed or he doesn't understand what constitutes intentional discrimination.

I recall for example that there were numerous instances cited in the lengthy report of the Lawyers' Committee for Civil Rights Under Law (which is already a part of the official record before this committee) detailing discrimination against minority voters. For example, former Justice Department official Robert Kengle reported that in Georgia, the Justice Department interposed several method-of-election objections where local governments "attempted to add at-large seats to single-member district plans under circumstances that strongly suggested a discriminatory purpose." Mr. Kengle's analysis noted by way of example the July 1992 objection to the Effingham County Commission's attempt to change the county's then-existing five-member single-member district plan (which had been adopted in response to a vote dilution lawsuit) to a mixed plan with five single-member districts and an at-large chair to be elected with a majority vote requirement. The Justice Department objected to the change stating:

> Under the proposed election system, the chairperson would be elected as a designated position by countywide election with a majority vote requirement. In the context of the racial bloc voting which pertains in Effingham County, the opportunity that currently exists for black voters to elect the commissioner who will serve as chairperson would be negated. **Moreover, it appears that these results were anticipated by those responsible for enactment of the proposed legislation. The proposed change to an at-large chairperson followed the elimination of the**

> **position of vice-chairperson, which had been held by a black commissioner since 1987. Although we have been advised that the proposed system was adopted in order to avoid the possibility of tie votes in the selection of the chairperson and for other proposals before the board, this rationale appears tenuous since the change to an even number of commissioners would invite tie votes to a greater extent than the existing system.**[1]

Mr. Chairman and members of the Committee, this was not ancient history. It was a little more than a decade ago, and well after the Supreme Court and Congress had observed the potential for diluting minority voting strength in racially polarized elections that such changes could produce. The various devices proposed in combination in Effingham County (numbered posts, majority vote requirement and at-large elections) have each been cited by the Supreme Court and the Congress as devices that enhance the opportunity for racial discrimination to occur in the electoral process. So when Mr. Clegg says there is little evidence of intentional discrimination and that the discrimination detailed in the congressional record is largely anecdotal, I respectfully disagree.

It is also important Mr. Chairman, that a number of objections interposed under Section 5 have been interposed to changes that had been illegally implemented (*i.e.*, without Section 5 preclearance) for years, or even decades. Some changes finally were submitted only as the result of litigation; in other cases, it appears that the unprecleared changes were detected by DOJ during the Section 5 review of other changes (such as annexations) that were later submitted by the jurisdiction. The utter failure to make a Section 5 submission of an objectionable change, when such changes have been known for years to increase the potential for racial discrimination in the political process, strongly suggests that deliberate racially discriminatory conduct is at work.

It is critical to recognize that in this day and age, evidence of intentional discrimination must often be gleaned from circumstantial evidence. That is because state and local officials largely avoid making overt public statements of racial animus. The point here is that Congress is entitled to look at the record it has developed and draw reasonable inferences that intentional discrimination continues to occur, and I think the record developed to date proves that it does. Drawing inferences of intentional discrimination from objective facts is hardly new. Indeed, the Supreme Court itself draws such inferences of intentional discrimination, largely utilizing the factors laid out in the *Arlington Heights* case to decide whether intentional discrimination may be inferred from certain actions of government officials.

Lastly, a couple of observations about some other provisions of the bill. I believe Congress was correct in not changing the bailout provisions. I am opposed to the adding of a provision that precludes any judicial review of the Attorney General's decision to certify federal observers in a covered jurisdiction. I believe that in some instances in 2004, decisions were made at the Department of Justice to send federal officials and

[1] John R. Dunne, Objection Letter, July 20, 1992

observers to jurisdictions based more on political considerations than racial considerations. For this same reason, I would also like to go on record as supporting legislation that overrules the Supreme Court's decision in *Morris v. Gressette* and would permit judicial review in extreme cases of decisions made by the Attorney General to grant preclearance to a voting change. I offer these observations because I have seen the Department of Justice's enforcement of the Voting Rights Act subject to increased manipulation by political appointees for partisan purposes. The recent revelations about the Texas re-redistricting and how the preclearance process got corrupted within the Department of Justice--and there are other examples—illustrate the need for this judicial review. I would, however, reserve it for extreme cases.